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Before the
Federal Communications Commission
Washington, D.C. 20554

APR 14 11 53 AM '93

MM Docket No. 92-59 ✓

DISPATCHED BY

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Bradenton and High Point, Florida)¹RM-7923
RM-8042**REPORT AND ORDER**
(Proceeding Terminated)

Adopted: March 23, 1993;

Released: April 14, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 2198 (1992), filed by Sunshine State Broadcasting Company, Inc. ("Sunshine"), proposing the substitution Channel 278C for Channel 277C1 at Bradenton, Florida, and modification of Station WDUV(FM)'s license to specify Channel 278C. Sunshine filed comments restating its intention to apply for Channel 278C, if allotted. Entertainment Communications, Inc. ("Entercom"), licensee of Station WYUU(FM), Channel 223C2, Safety Harbor, Florida, filed opposing comments. High Point Broadcast Partners ("High Point") filed a counterproposal requesting the allotment of Channel 275A to High Point, Florida as that community's first local service, which was subsequently withdrawn.² Entercom and Sunshine filed consolidated reply comments.³

2. In its comments, Entercom argues that the proposed substitution of Channel 278C for Channel 277C1 fails to satisfy the Commission's technical rules and the Federal Aviation Administration's ("FAA") limitations on tall towers within the permissible site zone for Channel 278C. Entercom states that according to an aeronautical study conducted by its engineering consultant a tower at the proposed coordinates would exceed FAA obstruction standards by 500 feet, and result in a height that increases the

minimum instrument flight altitude within the terminal area by 400 feet. In addition, the radar vectoring altitude throughout the site zone is currently 1600 feet AMSL; the tower proposed by Sunshine would require an increase of the radar vectoring altitude to 2000 feet AMSL, which the FAA might not approve.

3. In response, Sunshine challenges Entercom's allegations as failing to establish that there would be an adverse aeronautical determination throughout the entire area in which a transmitter could be located. Specifically, although conceding that Entercom is correct in its assessment that some areas within the allowable area may have limitations, Sunshine states that Entercom's assessment is flawed in that it fails to define those areas. Furthermore, Sunshine states that, contrary to Entercom's allegation, a tower at the reference site would not require a change to existing departure procedures at Peter O Knight Airport. Additionally, Sunshine states that Entercom's 1600 foot vectoring altitude analysis failed to take into account the closing of Mac Dill Air Force Base, the primary beneficiary of the 1600 foot vectoring altitude.

4. In opposition, Entercom attacks Sunshine's reference site as unsuitable for construction of a tower meeting minimum Class C requirements, and states that the suitability of this site establishes that Sunshine is unable to locate a fully-spaced transmitter site for its Class C proposal. In support of its allegation that the reference site is unsuitable, Entercom submits a preliminary finding of the FAA that states that the proposed construction would exceed FAA standards and is presumed to be a hazard to air navigation pending further study to prove the contrary. The FAA analysis also indicates that the proposed frequency could cause "hazardous three signal/third order intermodulation interference resulting in navigation receiver overload" to certain aircraft when landing on certain runways at the St. Petersburg Clearwater International Airport, Lakeland Linder Regional Airport and Tampa International Airport. Therefore, Entercom argues that the Sunshine proposal should be denied.

5. In its reply Sunshine maintains that the FAA finding is not a conclusive determination of hazard, but a preliminary determination based on the tower height. Additionally, Sunshine challenges the *bona fides* of Entercom in seeking out this preliminary determination by making a false certification to the FAA with respect to Sunshine's reference site. Finally, Sunshine argues that not only does the FAA finding fail to establish that its reference site is unavailable, but also that the FAA finding fails to establish that there is no site available for construction of its tower. Sunshine further argues that Entercom erroneously has

¹ The community of High Point has been added to the caption.

² Public Notice of the counterproposal was given on July 24, 1992, Report No. 1901.

Sunshine and High Point filed a joint request for approval of a settlement agreement in which High Point withdrew its counterproposal. In accordance with Section 1.420(j) of the Commission's Rules, Sunshine states that it has not paid or promised to pay money or other consideration in excess of the legitimate and prudent expenses incurred by High Point in filing its rule making petition. Therefore, we will dismiss High Point's counterproposal and need not consider pleadings responding to the counterproposal.

³ After the record closed, Entercom filed an Opposition to

Joint Request for Approval of Settlement Agreement, or, Alternatively, Supplement to Comments of Entertainment Communications. Sunshine filed a Motion to Strike and a Reply to Opposition to Joint Request for Approval of Settlement Agreement, or, Alternatively, Supplement to Comments of Entertainment Communications. Entercom filed Consolidated Opposition to Sunshines Motion to Strike and Response to Reply. Sunshine filed a Reply to Consolidated Opposition to Motion to Strike and Reponse to Reply. Although, the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period, we will consider the arguments raised herein, in order to have a complete record in this proceeding.

cited *West Palm Beach, Florida*, 6 FCC Rcd 6975 (1991) and *Crestview and West Bay, Florida*, 7 FCC Rcd 3059 (1992) in support of Entercom's arguments that the issue of the suitability of a particular site is required before an allotment will be made. Sunshine argues that *West Palm Beach* holds that the Commission will follow its usual practice of deferring to the application stage a determination as to the suitability of a transmitter site unless a party makes a showing that no theoretical sites exist, and that in *West Palm Beach*, as here, no showing was made. Further, Sunshine argues, in denying an allotment in *Crestview and West Bay*, the Commission found that while the reference site was technically unfeasible for use as a transmitter site, the basis for denial was not the infeasibility of that particular site but that there was no fully spaced feasible site for the channel to be allotted at that community. Thus, in that case, the presumption that a feasible site is available was rebutted. Here, Sunshine argues, Entercom has failed to show that no feasible site is available.

6. We believe the public interest would be served by substituting Channel 278C for Channel 277C1 at Bradenton, Florida. Sunshine correctly argues that Entercom has not established that the reference site is infeasible or that there are no feasible sites for the allotment of a channel. See *Crestview and West Bay*, and *West Palm Beach*. Therefore, in accordance with past practice, we find that the issues concerning FAA permissible site zoning problems are more appropriately addressed at the application stage where a specific transmitter site is before the Commission and the FAA. Channel 278C can be allotted to Bradenton, Florida, in compliance with the Commission's minimum distance separation requirements with a site restriction of 41.7 kilometers (25.9 miles) northeast⁴ in order to avoid a short-spacing to a construction permit for Station WQOL(FM), Channel 279C2, Vero Beach, Florida, and the licensed site of Station WRUF(FM), Channel 279C1, Gainesville, Florida. Channel 278C at Bradenton would be short-spaced to Channel 279C2, Station WXKB(FM), Cape Coral, Florida. However, Station WXKB(FM) was ordered in MM Docket No. 88-512 to specify operation on Channel 280C1. See 6 FCC Rcd 6966 (1991). The grant of an authorization for Channel 278C at Bradenton, Florida, may be withheld until Station WXKB(FM) is licensed on Channel 280C1 at Cape Coral, Florida. We shall modify the license for Station WDUV(FM) to specify Channel 278C in accordance with Section 1.420(g) of the Commission's Rules.

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective May 28, 1993, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| | |
|--------------------|-------------|
| City | Channel No. |
| Bradenton, Florida | 278C |

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WDUV(FM), Bradenton, Florida, IS MODIFIED, to specify operation on Channel 278C in lieu of Channel 277C1, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sunshine State Broadcasting Company, Inc., licensee of Station WDUV(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

10. IT IS FURTHER ORDERED, That the petition for rule making filed by High Point Broadcast Partners (RM-8042) seeking the allotment of Channel 275A to High Point, Florida, IS HEREBY DISMISSED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

⁴ The coordinates for Channel 278C at Bradenton are North Latitude 27-49-20 and West Longitude 82-21-50.